1937
May 10, 11 & 21.
1938
April 20.

BETWEEN:

HIS MAJESTY THE KING on the Information of the Attorney-General for the Dominion of Canada .... PLAINTIFF;

AND

IMPERIAL TOBACCO COMPANY OF CANADA LIMITED .... DEFENDANT.

Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, s. 119—Constitutional law—British North America Act, secs. 91 and 92—"Property and civil rights"—Ultra vires.

S. 119 of the Special War Revenue Act, R.S.C., 1927, c. 179, as enacted by 24-25 Geo V, c. 42, s. 14, provides: "Everyone liable under this Act to pay to His Majesty any of the taxes hereby imposed, or to collect the same on His Majesty's behalf, who collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to His Majesty, shall pay to His Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars."

Defendant company, a manufacturer, under colour of the statute, collected sums of money in excess of the amount which it was required to pay to His Majesty, in connection with goods produced or manufactured in Canada and also in connection with goods imported into Canada.

Held: That s. 119 of the Special War Revenue Act, R.S.C., 1927, c. 179, except the provision imposing a penalty, is *ultra vires* of the Parliament of Canada and consequently null and void.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant money allegedly collected by it, under colour of the Special War Revenue Act, in excess of the sum it was required to pay to His Majesty as consumption or sales tax, and penalty, under the provisions of the Special War Revenue Act, R.S.C., 1927, c. 179, and amendments thereto.

The action was tried before the Honourable Mr. Justice Angers, at Ottawa.

J. G. Ahearn, K.C. and *H. H. Ellis* for plaintiff.

L. A. Forsyth, K.C. and *Colville Sinclair, K.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

1938
THE KING
v.
IMPERIAL
TOBACCO CO.
OF CANADA
LTD.
Angers J.

ANGERS J. now (April 20, 1938) delivered the following judgment:

The plaintiff, by his action, seeks to recover from the defendant the sum of $68,132.54, made up as follows: $67,632.54 allegedly collected by the defendant, under colour of the Special War Revenue Act, in excess of the sum it was required to pay to His Majesty as consumption or sales tax and $500 penalty. The action is brought under the provisions of section 119 of the Act.

The information says in substance as follows:

by section 86 of the Special War Revenue Act, R.S.C., 1927, c. 179, it is enacted that, since April 7, 1932, "there shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods, produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof," of goods "imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption," and of goods "sold by a licensed wholesaler, payable by the vendor at the time of delivery by him";

by section 119 enacted and effective as and from the 28th of June, 1934, it is provided that

> everyone liable under this Act to pay to His Majesty any of the taxes hereby imposed, or to collect the same on His Majesty's behalf, who collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to His Majesty, shall pay to His Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars.

prior to April 7, 1932, there had been imposed by similar legislation to that contained in section 86 a consumption or sales tax of 4% instead of 6%;

the defendant for many years prior to April 7, 1932, and since that time has carried on business as manufacturer of cigars, cigarettes, tobaccos and accessories and as such was and is at all times in question herein required to pay to plaintiff a consumption or sales tax on the goods manufactured and sold by it;

prior to April 7, 1932, during the period when the sales tax was at the rate of 4%, the defendant did not charge the sales tax as a separate item on its invoices but charged its customers a composite price which included the said tax;

after April 7, 1932, when the rate was increased from 4% to 6%, the defendant continued to charge its customers the composite prices prevailing prior to the said date, adding thereto 2% of such composite prices on account of sales tax and the said 2% was shown as a separate item on every invoice;

the said item of 2% was collected from customers as being the increase in the rate of sales tax imposed from the 7th of April, 1932, but actually represented more than the said increase inasmuch as the said 2% was computed on the whole of the composite price, including the sales tax theretofore charged;

by this means the defendant, under colour of the statute, collected during the period from July 1, 1934, to December 31, 1935, the sum of $67,632.54 in excess of the amount which it was required to pay to His Majesty.

The Attorney-General, on behalf of His Majesty, claims:

judgment in the said sum of $67,632.54;
judgment in the penal sum of $500;
such further relief as shall seem meet;
the costs of the action.

The defendant, in its defence, admits that as and from the 28th of June, 1934, it has carried on business in Canada as a manufacturer of various tobacco products and that as and from that date His Majesty has been entitled to receive from it payment of consumption or sales tax as provided by the Special War Revenue Act, denies the other allegations of the information and says that the same are unfounded in law and irrelevant and pleads in substance as follows:

the defendant, as and from the 28th of June, 1934, has accounted for and paid to His Majesty all sums exigible from it for consumption or sales tax;

no sum or sums of money in excess of those required to be paid by the defendant to His Majesty have been collected by the defendant, under colour of the Special War Revenue Act, by the means alleged in the information or otherwise, during the period from July 1, 1934, to December 31, 1935, or at any time;

the defendant has during the said period, at all times, furnished quotations and made sales of its products to its customers upon an unequivocal and unambiguous state-

1938
THE KING
v.
IMPERIAL
TOBACCO CO.
OF CANADA
LTD.
Angers J.

ment of the price of such products and has received no moneys from its customers, either under colour of the Special War Revenue Act or otherwise, which it was not entitled to receive in accordance with the prices quoted to and accepted by such customers;

the obligation which section 119 purports to impose constitutes an interference with property and civil rights, a matter coming within the classes of subjects concerning which the legislature in each province has exclusive power to make laws by virtue of section 92 of the British North America Act; the Parliament of Canada has no authority, under any of the classes of subjects enumerated in section 91 of the British North America Act, to impose the obligation which section 119 purports to impose; section 119 is *ultra vires* of the Dominion of Canada and is illegal, null and void;

the claims made by His Majesty are unfounded in fact and in law.

A reply was filed by the plaintiff praying *acte* of the admissions contained in the statement of defence and denying the other allegations thereof.

The section of the Act imposing the consumption or sales tax is section 86; the only tax imposed by this section is a tax of four, six or eight per cent, as the case may be, according to the period of taxation in question: see R.S.C., 1927, c. 179, s. 86; 21-22 Geo. V, c. 54, s. 11; 22-23 Geo. V, c. 54, s. 11; 1 Ed. VIII, c. 45, s. 5.

Counsel for plaintiff submitted that section 119 creates an extension of the tax. His claim is that by section 86 the tax is made six per cent—or four or eight per cent depending on the taxation period—but that, if a manufacturer or producer collects more than the tax imposed by section 86, he must remit to the Government the entire amount so collected. According to him, the tax, in that case, is more than the rate fixed by section 86; it is that plus the sum collected in excess of the rate stipulated in the said section. I must admit that I cannot follow this mode of reasoning. Section 119 is not, in my opinion, a taxing section. It is apparently intended to prevent or at least dissuade the producer or manufacturer from collecting from a purchaser, under colour of the Act, a sum exceeding that which, under section 86, he is required to pay

to the Crown and from appropriating it. Its object is to take away from the manufacturer or producer the sum which he has exacted from a customer in excess of the amount which he is obliged to pay to His Majesty and to penalize the manufacturer or producer guilty of such exaction; a further object is to vest the ownership of the sum thus illegally exacted in His Majesty. Section 119 is, to say the least, an uncommon piece of legislation.

Taxes, I may say in passing, are imposed by statute and the provision imposing them must be categorical and unambiguous: Maxwell on the Interpretation of Statutes, 7th edition, p. 246; *Cox* v. *Rabbits* (1); *Tennant* v. *Smith* (2); *Harris Company Limited* v. *Rural Municipality of Bjorkdale* (3).

It was argued on behalf of the defendant that section 119, inasmuch as it purports to make the taxpayer liable to pay to the Crown moneys, which he either deliberately or by mistake has collected from a purchaser in excess of the amount which he is bound to pay as consumption or sales tax, is *ultra vires* of the Parliament of Canada.

The legislative powers of the Parliament of Canada and of the provincial legislatures, apart from those concerning education and agriculture which form the subject of sections 93 and 95 respectively, are governed by sections 91 and 92 of the British North America Act, 1867.

It seems to me convenient to quote from these sections the provisions which are relevant to the matter at issue:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

3. The raising of Money by any Mode or System of Taxation.

29. Such classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumera-

(1) (1877-78) 3 A.C. 473 at 478. (2) (1892) A.C. 150 at 154.
(3) (1929) 2 D.L.R. 507 at 512.

1938

THE KING v. IMPERIAL TOBACCO CO. OF CANADA LTD.

Angers J.

tion of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

13. Property and Civil Rights in the Province.

To determine whether an enactment is *ultra vires* of the Parliament of Canada one must find out if the subject thereof comes within the scope of section 92. If the subject appears *prima facie* to come within that section, it is necessary to ascertain whether the subject also falls under one of the enumerated heads in section 91. If it does, the Dominion Parliament has the paramount power of legislation in relation thereto. If the subject does not fall within either of the sets of the enumerated heads in sections 91 and 92, then the Dominion may have power to legislate under the general words contained in the first paragraph of section 91. This method of determining the respective powers of the Dominion Parliament and of the provincial legislatures is laid down clearly in, among others, the following decisions of the Judicial Committee of the Privy Council, namely: *Toronto Electric Commissioners* v. *Snider et al. and Attorneys-General for Canada and Ontario* (1); *John Deere Plow Co. Ltd.* v. *Wharton* (2).

In the first case above cited, Viscount Haldane said (p. 406):

The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the provinces by s 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

In the case of *John Deere Plow Co. Ltd.* v. *Wharton* (*ubi supra*) Viscount Haldane expressed a similar opinion (p. 337):

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power conferred on the Dominion by s. 91 to make laws for the peace, order, and good

(1) (1925) A.C. 396. (2) (1915) A.C. 330.

government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces. But if the subject-matter falls within any of the heads of s. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of s. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by s. 92.

See also *Russell* v. *The Queen* (1) and *The Citizens Insurance Company of Canada* v. *Parsons* (2).

In the case of *Russell* v. *The Queen,* Sir Montague E. Smith, who delivered the judgment of the Judicial Committee of the Privy Council, said (p. 836):

The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sections 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Company* v. *Parsons* (7 App. Cas. 96). According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in section 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the Parliament of Canada had not, by its general power "to make laws for the peace, order, and good government of Canada," full legislative authority to pass it.

It was argued for the defendant that section 119 interferes with property and civil rights, respecting which, under sections 91 and 92 of the British North America Act, provincial legislatures alone have the right to legislate. This contention appears to me well founded.

The words "property and civil rights" must be interpreted broadly: The *Citizens Insurance Company of Canada* v. *Parsons* (*ubi supra*), wherein Sir Montague E. Smith, delivering the judgment of the Judicial Committee, says (p. 110):

By that section (94 of the British North America Act) the Parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces.

(1) (1882) 7 A.C. 829. (2) (1881) 7 A.C. 96.

1938
THE KING
v.
IMPERIAL TOBACCO CO. OF CANADA LTD.
Angers J.

The words "property and civil rights" are, obviously, used in the same sense in this section as in no. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words "civil rights," contended for by the appellants were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. III, c. 83, which made provision for the Government of the province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

It was urged on behalf of plaintiff that the authority exercised by section 119 is ancillary to the raising of money by the system of sales tax; in support of his contention counsel relied upon the following cases: *Attorney-General for Ontario* v. *Attorney-General for Canada* (1); *Grand Trunk Railway Company of Canada* and *Attorney-General of Canada* (2); *Corporation of the City of Toronto* and *Canadian Pacific Railway Company* (3); *City of Montreal* v. *Montreal Street Railway Co.* and *Attorneys-General for Canada and Quebec* (4); *City of Montreal and Harbour Commissioners of Montreal* (5); *Royal Bank of Canada et al.* and *Larue et al. and Attorney-General for Canada* (6).

After carefully considering the arguments and authorities submitted by counsel, I have come to the conclusion that section 119 cannot be considered as ancillary or incidental to the collection of the tax imposed by section 86.

It was submitted by counsel for defendant that, where a power not enumerated in section 91 of the British North America Act is utilized by the Dominion Parliament, it is *ultra vires* unless it can be shown that it is not only help-

(1) (1894) A.C. 189.
(2) (1907) A.C. 65.
(3) (1908) A.C. 54.
(4) (1912) A.C. 333.
(5) (1926) A.C. 299.
(6) (1928) A.C. 187.

1938
THE KING
v.
IMPERIAL
TOBACCO CO.
OF CANADA
LTD.
—
Angers J.
—

ful but absolutely necessary to the exercise of such power. This principle was affirmed in the following case: *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), where Lord Tomlin said (p. 118):

It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s 91: see *Attorney-General of Ontario* v *Attorney-General for the Dominion* (1894 A.C. 189); and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896 A.C. 348).

Lord Sankey expressed a similar opinion *in re The Regulation and Control of Aeronautics in Canada* (2).

Reference may also be had to the case of *City of Montreal* v. *Montreal Street Railway* (*ubi supra*), in which Lord Atkinson, dealing with the legislative powers of the Dominion Parliament and of the provincial legislatures, said (p. 343):

It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1896 A C. 348)—(1) that the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial legislatures by the 16th subsection of s 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in s 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by s. 92; (3) that these enactments, ss. 91 and 92. indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; * * *

(1) (1930) A C. 111. (2) (1932) A.C. 54, at 72.

1938
THE KING
v.
IMPERIAL TOBACCO CO. OF CANADA LTD.
Angers J.

See also *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1).

It was incumbent upon the plaintiff to show that section 119 of the Special War Revenue Act comes within the powers given by section 91 of the British North America Act or that it is ancillary to the exercise of some power set forth in said section 91: *L'Union St. Jacques de Montréal* v. *Dame Julie Bélisle* (2). The plaintiff has not, in my opinion, fulfilled this obligation.

I believe that the defendant has collected, under colour of the Act, possibly by mistake which to my mind is not material, sums of money in excess of the sums which it was required to pay to His Majesty, in connection with goods produced or manufactured in Canada as well as in connection with goods imported into Canada; I am not satisfied, however, that the defendant has done so with regard to samples. With the evidence before me, I am not in a position to determine the amount of the sums so collected. At the close of the evidence it was agreed that the defendant would put its books at plaintiff's disposal and that the latter would have a statement prepared by auditors to take the place of the evidence which regularly should have been adduced at the trial. The case was accordingly adjourned for the production of this statement and for argument. When court resumed, counsel stated that, in view of the considerable amount of work required to prepare the statement in question, the parties had agreed that, pending a decision on the question of liability of the defendant, the quantum might be left in abeyance subject to further directions of the Court.

Section 119 of the Special War Revenue Act, except the provision imposing a penalty of $500 or less, is, in my opinion, *ultra vires* of the Parliament of Canada and consequently null and void. For this reason the action fails with regard to the claim for $67,632.54; it can only be maintained with regard to the penal sum of $500. There will accordingly be judgment in favour of plaintiff against the defendant for $500, with interest from the date of service of the information.

(1) (1896) A.C. 348 at 359.

(2) (1874) 20 L.C.J 29, at 47; L.R. 6 P.C. App. 31 at 36.

1938

THE KING v. IMPERIAL TOBACCO CO. OF CANADA LTD.

Angers J.

The defendant having seen fit to contest the action for the whole instead of admitting its liability for the penalty as, in my opinion, it should have done, the plaintiff is entitled to costs against the defendant; seeing, however, that the plaintiff succeeds only for a trifling part of his claim, the costs should be reduced; in fixing the amount at $250 I think that I will render justice to both parties.

Judgment accordingly.